No. 78-212

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In the Supreme Court of the United States

OCTOBER TERM, 1977

JOHN SCOTT ROUBAS,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

Petitioner, John Scott Roubas, prays that a writ of certiorari be issued to review the judgment of the Appellate Court of Illinois, First Judicial District.

Order Below

The Appellate Court of Illinois disposed of the appeal via an unpublished Order, No. 77-554, per Illinois Supreme Court Rule 23, and set forth as Appendix A, *infra.**

* The Appellate Court's Order, unpublished per Rule 23, Appendix A, is hereafter referred to as "Up.Or.App." "R." refers to the Record (Transcript of Proceedings on March 4, 1977), and "Supp. Rec." refers to the Supplemental Record filed by leave of the Appellate Court.

Jurisdiction

The Appellate Court entered its order on February 22, 1978; rehearing was denied on March 14, 1978. (App. B) Petition for Leave to Appeal to the Illinois Supreme Court was denied on May 26, 1978. (App. C) Jurisdiction is invoked pursuant to 28 U.S.C. 1257(3) and Rule 22.1 of the Rules of this Court.

QUESTION PRESENTED FOR REVIEW

Was petitioner deprived of due process of law in the manner by which the Appellate Court reversed the trial court's order granting a new trial on grounds of newly discovered evidence, where petitioner's original post-conviction claim in the trial court involved denial of due process of law due to his having been deprived of the constitutional right to present evidence demonstrative of innocence, and the trial court had ordered a new trial because, in the judge's own words:

> "[I]f such matters were known to the Court at the time of trial, it would cause a serious doubt in my mind of the credibility of the police officer, and I might have acquitted the defendant."[1]

Constitutional Provisions Involved

The Sixth Amendment to the Constitution of the United States provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the Constitution of the United States provides, *inter alia:*

> "Section 1. . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

Statement of the Case

Raising the Federal Question Below

Petitioner, John Scott Roubas (hereafter, defendant), was convicted of unlawful use of weapons[1] and sentenced to one to five years imprisonment under the enhanced penalty provision.[2] On appeal, his conviction was affirmed by the Illinois Appellate Court via unpublished Order per Illinois Supreme Court Rule 23.[3] His petition for rehearing was denied, as was his petition for leave to appeal to the Illinois Supreme Court. One of the issues raised at trial and in the direct appeal was the trial court's refusal to grant defendant's motion for a continuance, which defendant claimed deprived him of due process of law, for it effectively prevented him from presenting evidence (later in fact gathered) demonstrative of innocence.[4]

Defendant then filed a petition under the Post-Conviction Hearing Act,[5] claiming he was denied due process because denial of his request for continuance prevented him from presenting evidence demonstrative of innocence. After a hearing in the trial court, during the course of which the Judge stated his reasons, later reiterated as follows:

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[1] Ill. Rev. Stat. 1971, ch. 38, sec. 24-1(a)(4).

[2] Ill. Rev. Stat. 1971, ch. 38, sec. 24-1(b).

[3] Ill. Rev. Stat. 1975, ch. 110A, sec. 23.

[4] App. 4.

[5] Ill. Rev. Stat. 1975, ch. 38, par. 122.1, et seq.

> "[I]f such matters were known to the Court at the time of trial, it would cause a serious doubt in my mind of the credibility of the police officer, and I might have acquitted the defendant."[6],

the court ordered a new trial. The State prosecuted an appeal, and the Appellate Court of Illinois reversed the court's order,[7] reinstating the conviction.

The federal grounds here asserted were raised, pressed and ruled upon at each and every stage of the proceedings in the State courts, as above set forth.

Statement of Facts

At defendant's bench trial, it became crucial whether or not he knew a gun was in the vehicle he was driving. The prosecution introduced into evidence defendant's alleged oral statement—which he denied having made—that he had been shooting it at a suburban shooting range.[8] The prosecution did not dispute defense counsel's claim that the defense was not informed of this alleged, oral, in-custody statement to the arresting officers until the morning the case was called for trial, asserting that the statement had just then come to its (the prosecution's) attention.[9] The court denied defendant's motion for a continuance. While both defendant and his father testified at trial, disclaiming defendant's knowledge that the gun was present in the father's (leased) car,[10] the court, obviously disbelieved their in-court testimony in view of defendant's alleged on-the-spot statement upon arrest, chose to believe the officer, and convicted defendant.

[6] Supp. Rec. 3, quoted in Up.Or.App. 4-5.

[7] Via the Order contained as App. A, *infra*.

[8] Up.Or.App. 3-4.

[9] Up.Or.App. 2-3. Nor was the alleged oral statement contained in or referred to in any police reports. See *People* v. *Faulkner*, 83 Ill.App.2d 54, 226 N.E.2d 468, 469 (1 Dist. 1969).

* * *

The evidence presented in the post-conviction petition, not available at trial [due to denial of the continuance reasonably requested by defendant upon the State's (a) last-moment election to proceed on a different charge than it had originally stated,[11] and (b) eleventh hour discovery of a supposed oral statement damning defendant out of his own mouth] consisted of an affidavit of the proprietress of the gun range where (per the supposed statement) defendant allegedly had told the officers he had been using the gun on the day of his arrest. Per the affidavit, the owner's records indicated defendant was *not* at the gun range.

Granting defendant's motion for new trial, the trial court agreed that the new evidence would discredit the testimony of the police officer who testified defendant told him he was shooting the gun at the range that day. In amplifying his reasons for granting a new trial, the judge stated:

> "[I]f such matters were known to the Court at the time of trial, it would cause a serious doubt in my mind of the credibility of the police officer, and I might have acquitted the defendant."[12]

[10] Up.Or.App. 3-4.

[11] Up.Or.App. 2.

[12] Up.Or.App. 4-5.

REASON FOR GRANTING THE WRIT

The trial judge's order granting a new trial—based upon presentation of evidence which, per the judge, might have affected the outcome of the bench trial—was consistent with applicable law and appropriate to the facts; and, as there is no showing of manifest abuse of discretion, and the order being supported by substantial evidence, the Appellate Court's order reversing the grant of a new trial, effectively reinstating defendant's conviction, amounts to a denial of due process of law.

Certiorari should be allowed so that this Court may address important questions going to the heart of the judicial system, in the context of this bench trial.

At the time the Appellate Court originally affirmed, of course,[13] defendant had not yet successfully pressed his contention in the trial court. At *this* juncture, the big difference between the cause as earlier presented and the present posture of the cause is, at *this* point in time, the reviewing court *is* aware that the trial judge himself, presented with the evidence not available at trial, has stated, had this evidence been known to him at trialtime, it might have changed his decision on the cardinal issue of the officer's credibility and, hence, of defendant's guilt or innocence as well.

Stripped of rhetoric, the Appellate Court's order actuallay says: Despite the trial judge's uncontradicted statement that certain evidence unknown to him at trial might have resulted in defendant's acquittal, had he, the judge,

[13] See Up.Or.App. 2, 4.

known of that evidence before deciding the case,[14] defendant nonetheless stands convicted and condemned to serve time in the penitentiary. And this, even though the judge himself had granted a new trial based on this evidence.(!)

The order from which we seek relief, reverses the trial judge's grant of a new trial, though that new trial was ordered on the basis of the judge's *own* perception of the probable effect of that evidence upon his *own* decision-making process in a bench trial.[15]

There being absolutely *nothing* in the record to render untenable the trial judge's assessment of his own subjective mental processes—he having heard all the testimony at trial and being in a better position than anyone on earth to determine the probable effect of the new evidence upon his own decision-making process—the reviewing court's order reversing his grant of a new trial should be reversed so as to let stand the lower court's order.

* * *

This is a classic case of the substance of justice so subjugated to form that it fairly shrieks to be heard between the lines of the judgment order.

The convoluted logic which allows this anomalous outcome was, we thought, outmoded when this Court finally threw a monkey-wrench into the works of the "merry-go-round" of Illinois post-conviction procedures, lifting de-

[14] See fn. 15, *infra*.

[15] Referring to the evidence not presented at trial, submitted in support of the motion, the trial judge said:

> "[I]f such matters were known to the Court at the time of trial, it would cause a serious doubt in my mind of the credibility of the police officer, and I might have acquitted the defendant." (Supp. Rec. 3, quoted in Up.Or.App. 4-5.)

fendants caught in the "procedural morass" out of the "labyrinth."[16] Instead, the Appellate Court has lifted the carousel out of oblivion, its opinion has oiled the rusty gears, and the merrygo-round rides again.

• • •

Certiorari should be allowed to give this Court an opportunity to correct a grievous, manifest injustice.

It has been said, that perhaps as important as it is that justice *be* done, is that it *appear* that justice has been done. Not even the *appearance* of justice has been served by the Illinois reviewing courts in this case.

It seems that the Appellate Court decided the cause on the basis of issues not fully briefed by the parties.[17] Yet,

[16] See *Marino* v. *Ragen*, 332 U.S. 561, 564, 565, 567, 570 (1947) (epithetical language of Justice Rutledge, concurring, joined by JJ. Douglas and Murphy, commenting on former Illinois post-conviction procedural practices).

[17] As the thrust of the Appellant State's Brief was that the trial judge did not articulate reasons of record for his ruling allowing a new trial, Defendant-Appellee's answering Brief appropriately was directed to disproving this major contention. (See Up.Or.App. 1) Hence we devoted our answering Brief to demonstrating that the trial judge *did* state legally sufficient reasons, as required, for his order in defendant's favor. Believing the propriety of those reasons self-evident, in light of the facts and because the reasons involved the judge's *own* assessment of his *own* mental decision-making process, we did not extensively argue this issue in our Brief.

As the Appellate Court has determined that the trial judge thereby abused his discretion, the cause stands decided on the basis of an issue which defendant has not even argued to that court. See State's Reply Brief, p. 2. Of course, absent oral argument, we had no means to respond to the State's reply. See fn. 18, *infra*, and accompanying text.

Had oral argument been heard, the Appellate Court may well have been persuaded that on the totality of the facts, there was no abuse of discretion by the trial judge.

that court saw fit to dispose of the cause *without benefit of oral argument*, though both parties had requested it.[18]

• • •

The trial court's order is consistent with applicable law and appropriate to the facts.

The evidence not before the court at the original trial, and which was submitted via uncontroverted affidavit at the hearing on defendant's Post-Conviction Petition, consisted of an affidavit from the proprietress of a shooting range, the upshot of which was to cast grave doubt on the credibility of a police officer whose trial testimony sealed defendant's fate.[19]

The trial court's avowed reasons for granting the Petition, as contained in the "Amplification of Reasons," are legally sufficient and factually well-founded, *viz.:*

> "[I]f such matters were known to the Court at the time of trial, it would cause a serious doubt in my mind of the credibility of the officer, and I might have acquitted the defendant."[20]

Under Illinois law, to warrant a new trial, newly discovered evidence must be of such a conclusive character

[18] Each party requested oral argument on the cover of its Brief, per Rule 352(a) of the Rules of the Supreme Court of Illinois.

It should also be noted that although the Court did send out a notice that it was going to proceed to decision without oral argument, that notice was dated February 22, 1978, the very same day on which the Court's Order was entered. Thus, any privilege of objection to this procedure was foreclosed. Too, the notice bears an incorrect docket number of the cause. (App. D).

[19] R. 2; see Up.Or.App. 3-4.

[20] Supp. Rec. 3, quoted in Up.Or.App. 4-5.

that it would probably change the result on retrial,[21] and it must not be merely cumulative. *People* v. *Hughes*, 11 Ill.App.3d 224, 296 N.E.2d 643, 646-49 (2 Dist. 1973); *People* v. *Pirovolos*, 126 Ill.App.2d 361, 261 N.E.2d 701, 702 (1 Dist. 1970); *People* v. *Upshaw*, 58 Ill.App.2d 256, 207 N.E.2d 728 (1 Dist. 1965). In our view, the grant of a new trial here was in accordance with this standard. But to the extent the reviewing courts have disagreed, the standard bears re-evaluation.

Upon the facts, who can doubt the trial judge's statement that the new matter "would cause a serious doubt in my mind of the credibility of the police officer . . ."?

[21] This rule, that a new trial need not be granted on grounds of newly discovered evidence unless it would "probably" produce a different outcome on retrial, finds its origins in a case from this Court; this Court's decision in *United States* v. *Johnson*, 327 U.S. 106 (1945), frequently is cited as authority for the "would probably not produce" rule. The rule therein was mentioned in a footnote (327 U.S. at 110, n. 4), and this court relied solely upon the "frequently quoted and followed rule announced in *Berry* v. *State*, 10 Ga. 511 (1851)."

In *Berry*, the court considered valid and dispositive of another issue in that case, the rule that: "a negro has never been permitted to give evidence in any case, where the rights of a white person were concerned. And when we consider the degraded state in which they are placed by the laws, and the mental, as well as moral ignorance in which most of them are reared, not to advert to other reasons for excluding their testimony, it would be most unreasonable, as well as impolitic, to admit them as witnesses." 10 Ga. at 519.

Since this Court's approval of the "would probably not produce" rule was based upon its acceptance of the formulation in *Berry*, which decision includes the palpably invalid doctrine above set forth, clearly the time has come for re-evaluation of the rule. Constitutional concepts so radically have changed since the period which spawned *Berry* that any current rule traceable thereto bears re-scrutiny.

Nor can anyone doubt that he might have acquitted the defendant, had this evidence been before him at trial.

And thus, per the applicable legal principles, and apropos of the facts, the trial court's stated reasons support the ruling. The Appellate Court was simply wrong to reverse.

• • •

The presumption of validity of lower court's orders routinely is utilized on review to justify affirmance *against* appealing convicted defendants. Yet in this case, where to abide by this time-honored principle would require affirmance in *favor* of the individual and *against* the State, the Appellate Court has chosen to over-reach itself to ferret out a supposed "abuse of discretion" which *never*, we venture to posit, *never* would have been determined to reach the opposite result. This decision, we submit, represents the ill-conceived means to achieve the end desired by the prosecution and the reviewing court, that is, to reverse the decision and reinstate defendant's conviction, weaseling out of allowing him that new trial to which the trial judge himself ruled defendant was entitled.[22]

• • •

Because the trial court originally had denied defendant's motion for a continuance upon his surprise at an oral statement pulled out of the prosecutor's hat at trialtime,[23]

[22] The Appellate Court cognoticed that defendant had other serious charges pending (Up.Or.App. 2); we submit it is only human for a member of the panel to presuppose that defendant probably was guilty of *something*, so what harm can there be to let *this* charge *stick*? What harm, indeed! Justice must be dispensed, not dispensed with.

[23] See Up.Or.App. pp. 2-3. Also, defendant was surprised by the State's last-moment change in election as to the charge upon which it was going to proceed. *Ibid.* See pp. 4-5, *supra*.

defendant did not have available at trial the evidence here in question. While not every denial of a continuance amounts to a constitutional deprivation, in the afterlight of the trial judge's commentary on his reasons for granting a new trial—that he might have acquitted defendant, had this evidence then been known to him—this denial of a continuance, in retrospect, in *deed* deprived defendant of a fair trial. While this order is not itself the subject of the appeal, the underlying constitutional deprivation must here be alluded to, to place in proper perspective the Appellate Court's current determination to deprive defendant of that new trial at which the trial court *will* consider *all* pertinent evidence. Considering the underlying constitutional deprivation, lip service to fundamental rights lies fallow, and the court's decision that the procedural route defendant took precludes relief rings not only hollow and shallow, but, more important, wrong as well.

• • •

The Appellate Court now seems unwilling to admit that when it decided in the direct appeal that denial of a continuance was not prejudicial to defendant,[24] *it just might have been wrong* in view of later developments. We submit that while that decision *theoretically* may have been *correct* when made, it was later *proven wrong in actuality* because the fact is, defendant *has* presented hard evidence which *did* impel the trial judge to order a new trial.

[24] "Having already decided on direct appeal that the defendant was not prejudiced by the trial court's denial of a continuance, we find nothing in the instant petition to change our determination." Up.Or.App. 6.

PENULTIMATUM

If the proof of the pudding be in the eating, the truth of the word is in deed. Here, that defendant was prevented[25] from presenting evidence not then available to him but now available—which evidence *in fact,* per the trial judge, might *have changed the outcome* of the trial—is the proof of prejudice, of constitutional violation, inherent in the initial denial of continuance. No languid language can alter *that.* This Court's action can.

CONCLUSION

Because the Appellate Court decided the cause on the basis of matters not fully briefed by the parties, and without the benefit of oral argument, in an erroneous manner which perpetuates that constitutional deprivation of which defendant originally complained—and the proof of which is contained in the very order granting a new trial which the court has determined to reverse—certiorari should be granted; and, on the merits, the Appellate Court's order should be reversed, and the trial court's order reinstated and affirmed (both for Justice's sake, and defendant's).

Respectfully submitted,

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[25] It is undisputed that the material in question could not have been procured and presented at the original trial, given denial of defendant's motion for a continuance. Insistence upon a "myopic" approach, see *Unger* v. *Sarafite,* 376 U.S. 575, 589 (1964), resurrects the swamp which spawned the "morass" which we thought had been laid to rest by this Court. See language from *Marino* v. *Ragen,* pp. 7-8, *supra,* fn. 16 and accompanying text.

APPENDIX

APPENDIX A

77-554

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellant,

v.

JOHN SCOTT ROUBAS,
Defendant-Appellee.

Appeal from the Circuit Court of Cook County.
Honorable Walter J. Kowalski, Judge Presiding.

ORDER DISPOSING OF APPEAL
UNDER SUPREME COURT RULE 23

This is an appeal by the State from the granting of the defendant's post-conviction petition and the ordering of a new trial. The State contends that the trial court abused its discretion in granting the post-conviction petition where it made no findings of fact or conclusions of law to support its order and where the evidence presented in support of the petition was merely cumulative of the evidence presented at trial. We will not consider the first part of the State's contention since the amplification of reasons found in the supplemental record sets forth the trial court's basis for ordering the new trial.

The facts of this case show that the defendant, John Scott Roubas, was convicted of unlawful use of weapons (Ill.Rev.Stat., 1971, ch. 38, par. 24-1(a)(4)) and sentenced to a prison term of one to five years under the enhanced penalty provision (Ill.Rev.Stat., 1971, ch. 38, par. 24-1(b)).

On appeal his conviction was affirmed by this court pursuant to Supreme Court Rule 23 (No. 62372). His petition for rehearing was denied, as was his petition for leave to appeal filed May 14, 1976, to the Illinois Supreme Court (64 Ill.2d 598).

The defendant then filed a petition under the Post Conviction Hearing Act (Ill.Rev.Stat., 1975, ch. 38, par. 122-1, et seq.) claiming that he was denied due process of law because he was deprived of his constitutional right to present evidence on his behalf which would demonstrate his innocence of the charge against him. After a hearing in the Circuit Court, the petition was granted and a new trial was ordered. The State then prosecuted the present appeal.

A brief reiteration of matters considered by this court in the defendant's direct appeal is necessary to place in proper prospective the issue raised in the defendant's post-conviction petition. The defendant was originally charged with three counts of armed robbery and two counts of unlawful use of weapons, which were unrelated to the armed robberies. After severance of these charges and initiation of discovery procedures, the State apparently elected to go to trial first on the armed robbery charges. After several continuances, trial was set for December 12, 1974.

On that date the defendant filed a motion for a continuance alleging that on the afternoon of December 10, 1974, the defense counsel received word that the State was going to proceed on the unlawful use of weapons charges first because of its difficulty in contacting witnesses to the armed robberies. The motion alleged that the defendant was not prepared to go to trial on these charges. Defense counsel also alleged he had been informed on the date of

trial that the defendant made an oral in-custody statement to the arresting police officers and said statement did not appear in the State's answer to discovery. The State replied that the statement first came to its attention on the morning of the day of trial. The trial court first offered defense counsel a "day or so" to investigate the matters brought out by the State, and then permitted counsel until the afternoon session of court to complete the investigation. Defense counsel was permitted to interview the arresting police officers.

When the case was called on the afternoon of December 12, 1974, the defendant moved to suppress the statement, and a hearing thereon was held in conjunction with the trial. The motion was denied. The evidence at trial showed the defendant was driving his car when he was arrested based upon arrest warrants pertaining to the armed robberies. The defendant consented to have his car driven to the police station by the police. En route, the car hit a hole in the pavement, and a loaded .38-caliber handgun fell from under the dashboard, striking the foot of the officer driving the car. The police were allowed to testify to the contents of the defendant's oral statement that, when confronted with the gun, the defendant told the officers that it was his. He explained that he had owned several guns and sold all but that one to his father, and he had been shooting the gun at a suburban gun range but had not yet taken the weapon home. It was stipulated that the defendant had purchased the gun in question.

The defendant and his father testified on the former's behalf. Their testimony established that the defendant's father had leased the automobile in July 1973 for use by the father while collecting monies owed in connection with the family roofing business. The defendant occasionally

used the vehicle because he was residing at the Federal Community Treatment Center in Chicago and had no car of his own. The defendant's evidence further disclosed that the gun in question was purchased by the defendant ostensibly for his father and was to be used in connection with the family business. The father had placed the gun under the dashboard of the automobile several days after the car was leased, and it had been securely wedged with a rag so that it would not fall. The defendant maintained that he was unaware of the presence of the gun inside the car, and he denied that he told the police he had been using the gun at a shooting range on the day of his arrest. The defendant claimed that he denied knowledge of the gun when first confronted with it by the police because it was dark outside and the gun looked like any other gun.

On direct appeal the Appellate Court found no error in the trial court's refusal to grant the continuance and affirmed the defendant's conviction. In his petition for rehearing, different private counsel stated that based on an investigation the defendant was prepared to show that he was not at the shooting range on the date the police claimed or any date in July of 1973. The defendant unsuccessfully argued that this information would demonstrate the falsity of the police officer's testimony.

In this post-conviction proceeding, the defendant has presented the affidavit of the proprietress of Bell's Gun and Sports Shop to the effect that her records indicated that John Roubas was not at the gun range on July 14, 1973. The defendant claimed that this affidavit would discredit the testimony of the police officer that the defendant told him that he was shooting the gun at the range. The trial court agreed with this assessment of the new evidence, stating that if such matters had been known to the

court at the time of trial it would have cast a serious doubt on the credibility of the police officer and the defendant might have been acquitted.

We believe that the State's contention relating to the impropriety of granting of a new trial is well taken. In a post-conviction proceeding, if it is determined that the defendant has demonstrated a substantial constitutional claim, appropriate relief, including a new trial, may be granted. (Ill.Rev.Stat., 1975, ch. 38, par. 122-6.) The granting of such relief, however, is circumscribed by the waiver principle that constitutional claims which could have been raised on direct review are waived unless fundamental fairness requires otherwise. *People* v. *Mamolella* (1969), 42 Ill.2d 69, 245 N.E.2d 485; *People* v. *Carbona* (1977), 53 Ill.App.3d 1022, 369 N.E.2d 197.

Counsel has phrased his petition so as to avoid the appearance that he is using the Post Conviction Hearing Act as a vehicle to present "newly discovered evidence." Ordinarily, a claim of newly discovered evidence is not a constitutional question cognizable under the Post Conviction Hearing Act. (*People* v. *Oswalt* (1975), 26 Ill.App.3d 224, 324 N.E.2d 666; see *People* v. *Carbona*.) The new evidence in this case is an affidavit which is claimed to discredit the testimony of the arresting officer. The trial court reassessed the State's case in light of its interpretation of this affidavit. In doing so, the trial court misapprehended the function of post-conviction proceedings, which is not to relitigate the defendant's guilt or innocence but to determine whether he was denied constitutional rights. *People* v. *Shaw* (1971), 49 Ill.2d 309, 273 N.E.2d 816; *People* v. *Murphy* (1977), 46 Ill.App.3d 940, 361 N.E.2d 592.

We note that the defendant could have easily presented his claim of newly discovered evidence or the related constitutional claim if not at trial then certainly in a timely

post-trial motion. (Ill.Rev.Stat., 1975, ch. 38, par. 116-1.) The investigation necessary to obtain the affidavit eventually presented or like evidence could have been done within 30 days of the defendant's conviction. No explanation is made to justify a delay in the matter. It was only after new counsel had been retained that this claim was propounded, first in a petition for rehearing before this court on direct appeal, and eventually in these post-conviction proceedings. Seen in this light, we would be justified in finding that the argument has been waived.

But even considering the defendant's due process argument, we find it lacking. Every denial of a request for more time to prepare a case is not a denial of due process. Whether a constitutional violation has occurred must be examined on a case-by-case basis. *Ungar* v. *Sarafite* (1964), 376 U.S. 575, 11 L.Ed.2d 921, 84 S.Ct. 841; *United States* v. *Jones* (7th Cir. 1966), 369 F.2d 217; cert. denied 386 U.S. 944; *United States ex rel. Thompson* v. *Nierstheimer* (1948), 166 F.2d 87.) Having already decided on direct appeal that the defendant was not prejudiced by the trial court's denial of a continuance, we find nothing in the instant petition to change our determination. As we pointed out in the previous Rule 23 order, the defendant advanced a vigorous and thorough defense to the charges. Counsel extensively cross-examined the arresting officers, and reference was made to grand jury proceedings and to police reports in an attempt to discredit them. The refusal of additional time did not embarrass the preparation of a defense or otherwise prejudice the defendant's rights.

Counsel relies now on the portion of our Rule 23 order which implies that, had defendant been fully or partly prevented from presenting evidence at trial, error would have been committed. However, we find that the defendant

has not been prevented from presenting any evidence which he might have deemed favorable. As previously discussed, such evidence could have been presented by counsel if not at trial then certainly in a post-trial motion.

In the post-conviction petition the defendant also presented a claim pertaining to an ambiguity in the original finding of guilt. However, this claim was not argued by the defendant at the hearing in the trial court or in this court. We agree with the State that the issue could have been raised on direct appeal, but it was not. Therefore, this issue is waived. *People* v. *Whittaker* (1973), 10 Ill. App.3d 853, 295 N.E.2d 37.

In conclusion, we find that the defendant has presented no constitutional violation which would warrant relief the hearing on defendant's Post-Conviction Petition, conunder the Post Conviction Hearing Act; therefore, the court erred in granting a new trial.

Because this appeal presents no issue of precedential importance, an opinion would be unnecessary. Pursuant to Supreme Court Rule 23 (Ill.Rev.Stat., 1975, ch. 110A, par. 23) the judgment of the Circuit Court of Cook County is reversed.

Dated at Chicago, Illinois, this 22nd day of February 1978.

APPENDIX B

Rehearing was denied on March 14, 1978.

APPENDIX C

ILLINOIS SUPREME COURT
CLELL L. WOODS, Clerk
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

May 26, 1978

Mr. Julius Lucius Echeles
Attorney at Law
35 East Wacker Drive
Chicago, IL 60601

No. 50618—People State of Illinois, respondent, vs. John Scott Roubas, petitioner. Leave to appeal, Appellate Court, First District.

You are hereby notified that the Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

CLELL L. WOODS
Clerk of the Supreme Court

APPENDIX D

APPELLATE COURT OF ILLINOIS
Chicago Civic Center
Chicago, Illinois 60602

Chambers of
Justice Mel R. Jiganti

February 22, 1978

Hon. Bernard Carey
State's Attorney of Cook County
Richard J. Daley Center

Re: People of the State of Illinois
v. John Scott Roubas—No. 77-555

Gentlemen:

After an examination of the record and a review of the briefs herein, we are of the opinion that an oral argument is not necessary. We are therefore taking this case for consideration without oral argument, pursuant to Supreme Court Rule 352(a) as amended.

Very truly yours,

/s/ Mel R. Jiganti
Mel R. Jiganti
Presiding Justice
Third Division

MRJ:af
CC: Mr. Julius Lucius Echeles
35 East Wacker Drive
Chicago, Illinois 60601